# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

## PETITION FOR REHEARING

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Now come Petitioners; and pursuant to leave granted by Mr. Justice Jackson, on March 11, 1949, respectfully move this Honorable Court to grant a rehearing in the above captioned case, in which opinion was entered on February 28, 1949. In support thereof petitioners show to this Honorable Court as follows:

### I

**The Opinion of the Court Rejects the Finding of the Wisconsin Board and Both Wisconsin Courts Respecting the Objective of the Work Stoppages.**

The Wisconsin Board found that the purpose of the work stoppages was to induce the employer "to accede to the demands of the union to be included in the collective bargaining agreement being negotiated be-

tween the parties" (R. 16). It further found that the "respondent union and the individual respondents have publicly stated" their intent to continue such stoppages "for the purpose of inducing and coercing the complainant into compliance with their demands" (*ibid.*).

In its Memorandum accompanying its Findings of Fact, Conclusions of Law and Order, the Wisconsin Employment Relations Board pointed out that

> "Negotiations continued between the parties and were being carried on on November 6, 1945. On that day, the union commenced the practice of exerting economic pressure on the employer in an attempt to compel the employer to accede to requests made by the union. This pressure was exerted by a series of short work stoppages. * * *" (R.19).

The Wisconsin Board also stated in its Memorandum:

> "The officers of the Union publicly stated that such work stoppages constituted a new labor weapon and that they were instigated and carried on at the direction of the union and for the expressed purpose of attempting to compel the employer to accede to union demands." *(ibid).*

The Circuit Court of Milwaukee County found that the work stoppages were undertaken "for the purpose of enforcing compliance with demands made on the employer" (R. 6, 3); that "the employees attempted to secure the attainment of a lawful object, to wit, a collective bargaining agreement which would contain an improvement in the terms and conditions of their employment" (R. 8); that the specific demands which the union sought to obtain through the stoppages were those which the union had insisted upon in negotiations with the employer (R. 6-7); and that these facts were not obscured by the absence of "formal demand" made to the employer "before each walkout." (R. 6).

The Supreme Court of Wisconsin, after pointing out that "the evidentiary facts are not in dispute" (R. 106), and that "collective bargaining was in process to fix the terms of a new agreement" (R. 107), found that the

purpose of the walkouts was "to compel the company to comply with the union's demands respecting the terms of the contract being negotiated" (R. 107).

The uncontradicted evidence in the record shows that the object of the stoppages was to induce the employer to agree to the union's demands respecting some 19 issues in dispute between the parties (R. 47); demands which, on March 24, 1945, a panel of the 6th Regional War Labor Board had upheld, and which, on August 30, 1945, the 6th Regional Board itself had ordered the company to accept (R. 34). The uncontradicted evidence further shows that the work stoppages were undertaken on November 6th when "it became evident that the Company would not comply" with this directive of the Regional Board (R. 47); and that "the objective was to bring economic pressure against the company to force the company to agree to the directive of the board" *(ibid.)*.

There is not a scintilla of evidence in the record that the employer was not constantly and entirely aware that it could avoid the stoppages by accepting the directive order of the Regional Board. Indeed, the employer's own testimony shows his understanding that the union was willing to enter into a contract prohibiting all strikes and stoppages upon the employer's acceptance of the Regional Board's directive (R. 43-44). And the Vice-President of the corporation, who was in charge of negotiating the labor agreement with the union, admitted that he was informed many times since the commencement of the stoppages

> "that if *certain* demands with the union were not acceded to there would be further walkouts." (R.40)

In the face of these findings of three Wisconsin tribunals and the unequivocal evidence on which they rest this Court's opinion nevertheless states (slip op. p. 3):

> "The employer was not informed during this period of any specific demands which these tactics

were designed to enforce nor what concessions it could make to avoid them.[6]

"[6] Petitioners suggest, that the stoppages were initiated to force the employer to comply with a War Labor Board directive. However, the stoppages began several weeks before that directive reached either the union or the employer. By the latter date the War Labor Board had been abolished. Consequently the issuance of the directive would not seem to throw any light on the Union's motives * * *."

It is obvious, of course, that the stoppages which began on November 6, 1945, could not have been designed to induce compliance with a directive of the *National* Board which, as the record shows, was issued on December 20, 1945 (R. 34), and petitioners could not consciously have suggested that they were. Petitioners did contend, that, as the record proves, as the Wisconsin Board and courts found, and as the employer knew, the stoppages were undertaken to induce compliance with their demands as embodied in the directive of the *Regional* War Labor Board, which had been issued on August 30, 1945 (R. 34), two months before the walkouts began. This Court's finding that the employer did not know what demands the union was seeking to enforce, and did not know what concessions to make in order to bring an end to the stoppages, is thus based upon a misconception of the facts, a misconception which led this Court, inadvertently, we believe, to reverse the contrary findings of the state board and two state courts, and to substitute, for findings which the record supports, contrary findings which fly in the face of the evidence.

Apparently this Court did not take the Wisconsin Statute with the "gloss" of the Wisconsin Supreme Court opinion on it (*Hotel & Restaurant Employees, etc. v. Wisconsin Employment Relation Board*, 315 U. S. 437), but was misled into accepting the gloss which counsel for respondents placed upon the Statute, the Board Order, and the state decision. Respondents' counsel argued before the Circuit Court and the Wis-

consin Supreme Court that the Order of the Board could be justified by an alleged failure of the union to make any specific demands. They in effect argued that the Board's Order was sustainable on such alternative ground, although the Wisconsin Board obviously had not based the Order on such ground. However, neither court accepted this argument because of the conclusiveness of the record on this point, as illustrated by the testimony itself, the Findings of Fact of the Wisconsin Employment Relations Board, and the Memorandum Opinion of that Board accompanying those Findings.

There is not the slightest indication in either the Wisconsin Board's decision, Circuit Court decision, or in the Wisconsin Supreme Court decision that the decisions of the state were in any way based upon this alleged failure of demands.

Petitioners respectfully submit that the decision of this court should be based upon the Statute as construed and interpreted by the Wisconsin Supreme Court, and that any alleged alternative grounds, unsupported by the record, and which were not in fact the basis of the decision, may not properly be considered by this court in affirming that decision.

The fact is that the Wisconsin Supreme Court, in the view it took of the Statute, determined that it had only two questions to resolve. It first had to determine whether or not the activities of the union were concerted efforts to interfere with production. They obviously were. It next had to determine whether they came within the statutory exception, that is, whether they were strikes. It held that these activities were not strikes, as the State defines them. It, therefore, concluded that the Statute had been violated. That is all that the Wisconsin Court decided.

It confined its consideration to that part of Section 111.06 (2) (h) which makes "interference with production" unlawful, except in the case of a state-defined

strike. It did not consider that part of the statute relating to the taking of unauthorized possession of property (R. 110). Neither the frequency of the activities, the times at which they occurred, nor their duration were considered by the court, except insofar as it felt that those were not characteristics of a state-defined strike. Throughout its opinion, the Wisconsin Court emphasizes that the unlawfulness of the activities was found in their purpose, rather than in their method (R. 114, 116, 120). The Wisconsin Board had done likewise (R. 17, 21).

The issue, therefore, as framed by the Record, and as framed by the opinion of the Wisconsin Supreme Court, is whether the State of Wisconsin may restrain peaceful, concerted activities directed to the attainment of known legitimate collective bargaining demands, even though there is a resulting interference with production, solely because those activities do not meet the state definition of the term strike.

Inasmuch as this Court referred to the "unstated ends" with such frequency and with such emphasis so as to conclusively demonstrate that the decision of this court turned upon that point, and inasmuch as the record does not sustain the finding of this court that the activities were for "unstated ends", and since the Wisconsin Court did not base its decision upon that point, it is respectfully submitted that the Court reconsider its decision because of its misconception of the facts and the issue.

## II

**The Unwarranted Rejection of the Findings of the Wisconsin Board and Courts Led This Court to Overlook the Undisputed Fact That the National Labor Relations Board and the Federal Courts Hold Temporary Work Stoppages for the Objective Here Involved to Be Protected by Section 7 of the National Act.**

This Court's finding (slip op. p. 18), that the stoppages were undertaken to win "unstated ends" rather

than to achieve specific demands apparently led the Court to misconceive the issue deemed crucial by both the National Board and the federal courts in deciding whether particular temporary work stoppages are or are not protected by Section 7 of the National Act; and to reject as inapplicable the uniform, unreversed holdings of the National Board that unannounced temporary work stoppages are protected by Section 7 provided that the stoppages are not an end in themselves, but a means to an end protected by Section 7.

The opinion of this court, relying primarily upon the *Conn* and *Home Beneficial* cases, states (slip op. p. 10), that the United States Courts of Appeals "have denied comparable work stoppages the protection of that section". But these cases can be regarded as "comparable" only if it is assumed (contrary to the record herein) that the objective of the intermittent work stoppages in this case was the unilateral fixing by the employees of the hours of their employment, an objective which was achieved by the stoppages themselves. Such was found by the Courts to be the objective of the stoppages in the *Conn* and *Home Beneficial* cases, and the opinions in both cases show that the conduct there involved was held not protected precisely because the objective was unilaterally to fix the terms of employment, rather than to induce the employer to come to an agreement concerning terms of employment.

In the *Conn* case, where employees refused to obey the employer's orders to work overtime because they did not want to work overtime except for premium pay, the court pointed out that the employees did not stop work for the purpose of exerting economic pressure on the employer to change the overtime rules, but rather "sought and intended to continue work upon their own notion of the terms which should prevail" (108 F. 2d 390, 397). Their activity was held not protected by Section 7 because the Act does not confer upon an employee "the right to work on terms pre-

scribed solely by him;" the right to engage in concerted activity for purposes of "collective bargaining," obviously does not include the right of employees unilaterally "to fix the hours (or other terms) of their employment" (108 F. 2d, at p. 397).

Similarly, in the *Home Beneficial* case, the concerted activity which the court held not protected was the activity of insurance agents who, because of dissatisfaction with the employer's rule requiring agents to report to the office each morning before beginning work, undertook unilaterally to change this condition of their employment by simply refusing to report daily while otherwise performing their work. There, as in the *Conn* case, the objective of the activity was accomplished by the activity itself; there, as in the *Conn* case, the activity, both in purpose and effect, was unilateral alteration by employees of the conditions of their employment. And the opinion of the Court of Appeals for the fourth Circuit, in holding the activity not protected, quotes and relies upon the reasoning of the *Conn* case.

There are no decisions by Federal Circuit Courts of Appeals which hold or even suggest that one temporary walkout, or a series of temporary walkouts, by a majority of the employees in the bargaining unit, for the purpose of enforcing lawful demands in the course of collective bargaining are not within the scope of protection accorded concerted activities by Section 7 [1]. On the other hand there are unequivocal decisions of the Na-

1/ *Labor Board vs. Draper Corp.*, 145 F. 2d 199 (C. C. A. 4); *Labor Board vs. Indiana Desk Co*, 149 F. 2d 987 (C. C. A. 7); and *Labor Board vs Condenser Corp.*, 128 F. 2d 67 (C. C. A. 3), cited in this Court's opinion (slip op. p. 10) do not look to the contrary. In the *Draper* case a minority group struck to usurp the collective bargaining status of the certified representative, and the court regarded the object of their activity as interference with and antithetical to the collective bargaining envisioned by Section 7, and hence not within the protection of that Section. In the *Indiana* Desk case the object of the strike was to compel the employer to grant an illegal wage increase; the court holding that the "concerted activities for purposes of collective bargaining" which are protected by Section 7 do not include activities which aim at objectives which cannot lawfully be achieved in collective bargaining. It is significant that in this case two groups of employees walked out during working hours without warning to the employer, and without communicating to the employer any de-

tional Labor Relations Board, which have never even been subject to challenge in the federal courts, and have uniformly been deemed authoritative, holding that one or more temporary work stoppages, undertaken for the purpose of bringing economic pressure to bear upon an employer to induce him to comply with lawful demands are concerted activities protected by Section 7 of the Act.

In *Matter of Harnischfeger Corp.*, 9 N.L.R.B. 676, 685, for the purpose of inducing the employer to accede to their demand for a signed collective agreement, the employees, acting in concert, repeatedly refused to work overtime. The Board held that the refusal to work overtime "was, in effect, a partial strike" (9 N.L.R.B., at 686); that this concerted activity was protected by Section 7 of the Act despite the fact that the employer was not notified that such activity would be undertaken to induce him to sign an agreement (9 N.L.R.B., at p. 685); and that the protection afforded by Section 7 to concerted activities was not forfeited merely because the tactics used interrupted production and occasioned the employer "considerable difficulty" *(ibid.)*. The Board expressly pointed out that "calling a strike would have occasioned the (employer) much more serious difficulty, and it cannot be contended that employees may properly be discharged for calling a strike" *(ibid.)*.

In *Matter of Cudahy Packing Co.*, 29 N.L.R.B. 837, the employees, in an effort to induce the employer to revoke a scheduled change in working conditions, engaged in a series of work stoppages lasting 10 and 20

mands (149 F. 2d 987, 989). The opinion shows that the court did not regard these facts as in any way militating against the protection accorded to concerted activities by Section 7. In the *Condenser* case the court held unprotected a spontaneous cessation of work during the middle of the working day, the object of which was to compel the employer to meet with them to adjust grievances immediately rather than at the end of the working day, as the employer had promised. The opinion shows on its face that the court held the activity not protected because it regarded its objective as improper, not because it deemed any temporary cessation of work an inappropriate means for bringing economic pressure on the employer, but because "Employees cannot insist that their demands be met in the middle of a working day, when the employer has promised to deal with them as a group at the end of the day" (128 F. 2d 67, 77).

minutes each. The employer was not notified that stoppages would occur. The Board held that the union's program of planned stoppages, for the purpose of inducing the employer to comply with the union's lawful demand, was a form of concerted activity protected by Section 7 of the Act. The Board found that the stoppages were "a type of strike" and that there was "no warrant" for holding them not protected by the Act (29 N.L.R.B. 867-868).

These cases, as well as others cited in the Court's opinion (slip op. p. 9), make it perfectly clear that the Board has uniformly and repeatedly held that temporary work stoppages engaged in for the purpose of inducing an employer to accede to lawful demands concerning wages, hours and working conditions are protected by Section 7 of the Act; that stoppages are protected as much when the employees intend to return to work at a fixed time regardless of whether their demands are met, as when they intend to remain on strike until their demands are met or withdrawn; that the protection is not conditioned upon notification to the employer that stoppages will occur unless specific demands are met [2]; and that the statute's guarantee of the right to engage in such activity is not forfeited by repeated exercise of the right.

That the federal courts approve this view of the scope of protection accorded concerted activities by Section 7 is evident from the grounds upon which the Courts of Appeals predicated their decisions in the *Conn* and *Home Beneficial* cases. Nothing in those opinions suggest that temporary, recurrent work stoppages are *per se* unprotected by Section 7, or that work stoppages lose protection if employees do not stay away until their demands are met or abandoned; indeed, by emphasizing that the vice in those cases lay *in the objective*, i. e., unilateral establishment of conditions of employment,

2/ Cf. *N.L.R.B. vs. Kalamazoo Stationery Co.*, 160 F. 2d 465 (C. C. A. 6), certiorari denied, 332 U.S. 152.

the Courts indicated their agreement with the Board's view that when such stoppages are utilized to obtain objectives within the proper scope of collective bargaining, the stoppages are protected. And the Committees of Congress which, in 1947, after careful and painstaking study of the entire body of Board doctrine, reported their findings and recommendation for amendment of the National Act, nowhere indicated disapproval or disagreement with the interpretation of Section 7 adopted and applied by the Board in the *Harnischfeger*, *Cudahy*, and similar cases.

Of course these cases do not hold that "all work stoppages are federally protected concerted activities" (slip op. p. 9), or that "all concerted activities" are "protected" (slip op. p. 10). But this Court clearly erred in assuming that, because there was no such rule, it followed that the concerted activities in the instant case were not within the scope of protection established by "fixed Board interpretation" (slip op. pp. 9, 10).

## III

### The Court Erroneously Assumed That the National Board Does Not Protect the Right of Employees to Engage in Temporary Work Stoppages of the Kind Here Involved But Merely Shields Employees Who Engage in Them From Discharges Motivated by Anti-Union Animus.

As we read the Court's opinion (slip op. pp. 9-10), the Court appears to have assumed that the National Board in cases such as *Harnischfeger* and *Armour* was not concerned with the question whether the right to engage in the type of work stoppages there involved was guaranteed by Section 7, but decided only that an employer, motivated by anti-union animus, could not impose the heavy penalty of discharge upon employees who engaged in such activity. It is clear, however, we submit, even from the quoted excerpt of the Board's opinion in the *Harnischfeger* case (slip op. pp. 9-10), that the

Board regards Section 7 as conferring upon employees *the right* to engage in certain types of concerted activities for purposes of collective bargaining. The question dealt with in the *Harnischfeger* and similar cases was whether temporary work stoppages to achieve objectives in the area of collective bargaining were among the type of activities to which the guarantees of Section 7 extend. The Board's statement that the activities involved in that case were not "indefensible" expressed the Board's conclusion that the rights conferred in Section 7 comprehend the right to engage in these activities, not merely that an employer motivated by anti-union animus could not penalize participation in such activity by discharge.

That an employer is prohibited from interfering with concerted activities which are protected by Section 7 by any method, including the establishment of plant rules, or the imposition of any discipline, including discharge, and that the discharge of an employee for engaging in such activity is *ipso facto* violative of Section 8 (3) regardless of the employer's motive, is apparent not only from the uniform holdings of the Board and all of the federal courts including this Court, but from the terms of the Act itself. Section 8 (1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Clearly the discharge of an employee for engaging in any activity which marks the exercise of a right guaranteed by Section 7, thereby interferes with, restrains and coerces employees in violation of Section 8 (1). Such a discharge, as this Court held in *National Labor Relations Board vs. Republic Aviation Corp.*, 324 U.S. 793, 805, is necessarily discrimination prohibited by Section 8 (3) of the Act, regardles of the absence of anti-union animus, since "it discourages membership in a labor organization." In the *American Manufacturing* case, 7 N.L.R.B. 753, 759-760 (enforced by the Court of Appeals for the Fifth Circuit by consent of the parties, subsequent contempt proceedings reported 132 F. 2d 750 (C. C. A. 5), certiorari denied, 319 U.S. 743), the Board

held that the action of the employer in promulgating a plant rule prohibiting employees from engaging in temporary work stoppages and threatening to discharge employees who did, violated Section 8 (1) of the Act because "the purpose and effect" of the employer's action was "to restrain them from engaging in concerted activities for their mutual aid and protection."

It is therefore apparent that the Board decisions which hold that an employer may not discharge employees for participating in concerted activities which are protected by Section 7, rest upon the premise that Congress has conferred upon employees the right to engage in such activity and that any employer action, including discharge, which tends to restrain the exercise of that right is, for that reason alone, violative of Section 8 of the Act.

## IV.

### The Court's Opinion Rests on the Erroneous Premise That Because the Act Does Not Protect, Against State Interference, All Activities in Aid of Collective Bargaining Merely Because They Are Concerted, the Activities Here Involved Are not Within the Area Affirmatively Guaranteed.

The Court in its opinion regards as "elementary" the proposition that "what Congress constitutionally has given, the state may not constitutionally take away" (slip op. p. 8). Nor does the Court purport to depart from the rule enunciated in the *Allen-Bradley* case, 315 U.S. 740, 750, and applied in *Hill vs. Florida*, 325 U.S. 538, that any state action which "impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the Federal Act" cannot Constitutionally stand. Nevertheless, the effect of the Court's opinion is directly in conflict with these principles since it permits the states not only to whittle away, but to destroy completely the federally guaranteed right

to engage in concerted activities for purposes of collective bargaining.

The Wagner Act's guarantee of the right "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection" appears in Section 7 as part of the same sentence which guarantees to employees the right "to bargain collectively through representatives of their own choosing." Congress conferred both guarantees alike by the single introductory phrase "Employees shall have the right." It cannot even be suggested, we submit, that while both rights were conferred upon employees in a single breath, one right is immunized against state interference, as *Hill vs. Florida* holds, but the other is not immune.

It was no accident that Congress conjoined in Section 7 the right to engage in concerted activities for purposes of collective bargaining with the right to self organization and the right to bargain collectively through freely chosen representatives. Protection of the right to engage in concerted activities for purposes of collective bargaining represented the deliberate judgment of Congress that the objective of the statute to increase the bargaining power of employees *vis-a-vis* the employer, thereby enabling them to obtain better wages, hours and working conditions, required full protection of the right of employees, acting in concert, to interrupt production by stopping work. Congress determined that employees must be free to impose such economic injury upon employers because only thereby could they have even a chance of obtaining improved wages or working conditions from recalcitrant employers. Unless employees were free to support their lawful demands by concerted work stoppages which interfered with production, equality of bargaining power would be a myth, and the evils which Congress sought to eliminate by the statute would continue to fester and poison the national economy. Congress conferred upon employees the right to engage in concerted activities because it determined that in the

interests of national policy the need of employees for effective means of bringing economic pressure to bear upon employers in support of lawful economic demands should supersede the desire of employers to maintain uninterrupted production.

These facts have repeatedly been recognized by decisions of this Court, other federal courts, and by the National Labor Relations Board. In *Allen-Bradley Co. vs. Local Union 3*, 325 U.S. 797, 805, this Court noted that one of the major purposes of Congress in enacting the National Labor Relations Act, as the Norris-La-Guardia Act, was to accord affirmative protection to the right to engage in concerted activities for the purpose of collective bargaining, activities which warranted federal protection because of their "public importance under modern economic conditions." And, as we have shown above, the National Labor Relations Board and the federal Courts of Appeal have uniformly taken the view that work stoppages for the purpose of enforcing lawful collective bargaining demands cannot possibly be deemed removed from the area of protection accorded by the Act merely because they are termed "unwarranted interference with production" (*Matter of Armour and Company*, 25 N.L.R.B. 989, 996), or because the activity causes an employer "considerable difficulty" in scheduling production (*Matter of Harnischfeger Corp.*, 9 N.L.R.B. 676, 686).

It follows that if the employer had discharged employees who engaged in the concerted activities here involved for the reason that the activities "interfered with production", the National Labor Relations Board would have found the discharges violative of the federal Act because they restrained the exercise of rights therein guaranteed the employees. Unless, then, the states are empowered to narrow the scope of protection accorded to concerted activities by Congress, thereby precluding the National Board from protecting activities such as these against interference by employers, the action of

Wisconsin in enjoining the activities must be deemed in conflict with federal law. For, as the late Mr. Chief Justice Stone pointed out in his concurring opinion in *Hill vs. Florida*, 325 U. S. 538, 545:

> "The fact that the National Labor Relations Act imposes sanctions on the employer alone does not mean that it did not by Section 7, confer the right on employees as against others as well as the employer * * *. Section 7 confers the right * * * generally on employees and not merely as against the employer."

Certainly, as the *Hill* case holds, an injunction restraining the exercise of a right guaranteed by Section 7 is as much forbidden interference with that right as any sanctions which an employer might impose.

This Court holds, however (slip op. pp. 10-11), that its own prior decisions in the *Fansteel, Southern Steamship, Sands* and *Allen-Bradley* cases require the view that the states are free to narrow the scope of federally protected concerted activities as Wisconsin has here attempted to narrow it. We believe not only that the cases cannot fairly be so construed, but that to so apply them is to make a mockery of federal policy in this field.

It is true, of course, as the *Allen-Bradley* case, 315 U.S. 740, holds, that Section 7 does not draw from the state's power to enjoin or to punish conduct which, though it occurs in the course of concerted activities for purposes of collective bargaining, the state has, on independent grounds in the exercise of its police power, made unlawful. The states may illegalize tortious seizure of another's property, fraud, violence, and the like, and may apply such laws to employees as well as all other persons within their jurisdiction. And when employees, in the course of concerted activities for purposes of collective bargaining engage in conduct which, if done by them or others on any other occasion would run afoul of state law, Section 7 neither immunizes their conduct from employer sanctions designed to bring it to

an end nor does it impede the remedial powers of the states. The decisions of this Court cited on pp. 10-11 of the opinion hold no more than this. [3]. They do hold, as this Court notes on p. 11 of the opinion, that "otherwise illegal action", action which would be illegal if undertaken by one employee alone, is not immunized by Section 7 merely because it is done by many employees acting together in aid of collective bargaining. But they do not hold, and without completely destroying federal protection of the right, they cannot be deemed to hold, that a state may, consistently with Section 7, illegalize any concerted temporary work stoppage in aid of collective bargaining merely because such concerted action "interrupts production" and thereby imposes economic injury on the employer. If a state could, consistently with Section 7, regard consequential economic injury to the employer as sufficient grounds for illegalizing any temporary work stoppage in aid of collective bargaining (the sole ground for the state action in this case), it could illegalize all work stoppages. For, as the National Board pointed out in the *Harnischfeger* case, supra, as the Circuit Court pointed out in this case (R. 7-8), and as the record shows (R. 43), the only difference between temporary stoppages such as those which occurred in the instant case and long term strikes is that the former disrupt production less, and occasion smaller economic detriment to the employer than the latter. If Section 7 does not bar a state from attempting to shield the economic interests of employers in uninterrupted production by enjoining temporary stoppages such as these, then *a fortiori* it does not bar the state from protecting employers against all economic pressure exerted in concert by employees by enjoining all strikes.

We cannot believe that this Court intended so to hold. Indeed, the opinion concedes to Section 7 the role of im-

3/ *The Southern Steamship* case, of course, is an instance of conduct made illegal by another federal law, which, for this reason, is not protected by Section 7 despite the fact that it is concerted and in aid of collective bargaining.

munizing "otherwise lawful activities to aid unionization" from the reach of state attempts to illegalize them "merely because they are undertaken by many persons acting in concert" (slip op. p. 11). But while the Court says that Section 7 means that "legal conduct may not be made illegal by concert", its opinion fails to recognize that this is precisely what Wisconsin in this case has done.

Section 111.06 (2) (h), of the Wisconsin Act, on its face, and as construed by the Wisconsin Board and courts, makes it unlawful for employees "to engage in any *concerted* effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike" (slip op. pp. 1, 4; R. 113). Perfectly clearly, Wisconsin does not deem it unlawful for an employee to engage in an *individual*, not *concerted*, effort to interfere with production by leaving work temporarily. What Wisconsin has done is to make it unlawful for employees to do in concert what each may lawfully do individually. This is nothing more nor less than the application of the "conspiracy weapon" which this Court in its opinion (slip op. p. 11), holds that Section 7 took away from the employer and the state. The very language of this Court's opinion thus requires a contrary judgment.

But Wisconsin has done more in this case than apply the conspiracy doctrine to illegalize otherwise lawful activities, in the teeth of Section 7. Wisconsin has made these concerted activities illegal for the sole reason that their objective is "to interfere with production." The Supreme Court of Wisconsin held these activities unlawful solely because this was their "objective", and because that court found that the Wisconsin Act made this objective "unlawful" (R. 116, 120). What Wisconsin has done, therefore, is to substitute its own judgment for the contrary judgment of Congress that, with respect to temporary work stoppages, the interests of the employer in uninterrupted production outweigh the inter-

ests of the employees in effectively supporting their legitimate economic demands. Wisconsin can no more be permitted to do that without nullifying federal supremacy than could Florida, in the *Hill* case, be permitted to substitute for the judgment of Congress that employees should be totally unrestrained in their choice of bargaining agents, the state's notion that the employees' choice should be limited to those agents who complied with the requirements of state law.

## V.

### The Court Erred in Holding That Under the Federal Act the Federal Board Has No Authority Either to Investigate or Approve the Union Conduct in Question.

This court, in rejecting Petitioners' argument that the activities herein involved were protected under the National Act and within the exclusive jurisdiction of the National Labor Relations Board, based such rejection upon its conclusion that the National Labor Relations Board did not have the authority either to investigate or approve the union conduct in question, and that, therefore, such conduct was subject to state control. Petitioners submit that in so holding this Court has overlooked the fact that the National Labor Relations Board, in all cases involving alleged discriminatory discharge, is under the duty to consider and must make investigation of the nature of the activities for which the discharge was made. Almost the entire body of law, growing out of the enactment of the National Labor Relations Act, concerns itself with whether or not certain types of activities engaged in by employees, whether acting singly or in concert, are protected under Sections 7 and 13 of the Act. Where the finding is that such activities are protected, the Board directs reinstatement with back pay. Where the finding is that such activities are not protected, the Board dismisses the case. In the instant case, therefore, the National Board did have the authority to determine whether or not the activities engaged in by the union were protected activities. The matter

would properly have come before the Board in the event of a discharge of any of the Petitioners herein. Yet the court seems to commend the employer for its failure to make a discharge in order to determine whether or not the activities are protected activities, and for taking what this court apparently considers to be the less drastic step of invoking the injunctive processes of the state to restrain virtually all employees within the bargaining unit from engaging in their right to stop work for the purpose of attaining collective bargaining demands. It sounds rather strange today to hear the United States Supreme Court speak of a labor injunction as being a less drastic step than the discharge of an individual employee or union officer, who, in such event, may look to the National Labor Relations Board for protection, if he is entitled to it.

That the employer here chose to place the issue before a state agency under a state law should not weigh the balance in the employer's favor, where we are dealing with federal legislation and federally protected rights. What the court has here approved is the complete circumvention of the agencies set up by the federal government for the purpose of protecting the rights of employees and has permitted the long and tedious process of litigation before a state board, a state intermediate appellate court, a state final appellate court, and the United States Supreme Court for the purpose of ascertaining the broad reaches of Section 7. In this manner the administrative agency, in whom the Congress has placed the original and primary duty to ascertain what are protected rights under Section 7, has been completely ignored, and this court is required to conjecture over what the policy of the National Board would be in dealing with this type of situation. Reason enough, we believe, to find that Congress has pre-empted the field.

This court has also overlooked the fact that the sole basis of the employer's complaint is the fact that the employees had not gone out on a conventional, full-time

strike. Yet the employer could very easily have created that very situation by closing its plant until such time as the dispute over the new contract was settled. This it had a right to do, without running afoul of the National Law. So, although the burden placed upon the employer resulting from the exercise of concerted activities guaranteed under Section 7 never has been a basis for testing what those rights are, the court has, in effect, said that since the employer did not discharge any of the leaders of the union, and since the employer did not avail itself of the right to close down the plant until the dispute was settled, the employer is entitled to the protection of an injunction issued by the state because the particular type of stoppages herein involved were effective. Employees and their unions are told by this Court that they are free to engage in concerted activities, unless those activities are demonstrably effective, at which point, and for that reason, the state may step in and restrain such activities. The Wagner Act thus goes the way of the Clayton Act.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Rehearing should be granted, and that the judgment of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted,

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This Petition for Rehearing is presented in good faith and not for delay.